# No. 15,445

IN THE

# United States Court of Appeals

## For the Ninth Circuit

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PLUMBING AND PIPE FITTING LABOR-MANAGEMENT RELATIONS TRUST, et al.,
*Appellants,*

vs.

CONDITIONED AIR AND REFRIGERATION CO., a corporation, et al.,
*Appellees.*

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## REPLY BRIEF ON BEHALF OF APPELLANTS.

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## REPLY BRIEF ON BEHALF OF APPELLANTS.

### REPLY TO APPELLEES' DISCUSSION OF APPELLANTS' ARGUMENTS.

The fact that the employees of a particular employer may have to strike to obtain the socially desirable end of labor-management co-operation does not render the co-operation any less voluntary if and when the strike is successful, or the socially desirable end any less socially desirable.

The strikes that preceded the present United States Steel Agreement and other steel company agreements, the General Motors Agreement and other automobile agreements did not and do not render such agreements other

than voluntary or the present day co-operation between management and labor in such industries any less real. See *Parkinson Co. v. Bldg. Trades Council,* 154 Cal. 581, 598; 610.

We suggest and submit that when Senator Taft described Section 302 as written to prevent "extortion or a case where the Union representative is shaking down the employer" (Congressional History Labor Management Relations Act, 1947, p. 1311, col. 2) he was not advocating the destruction of Labor-Management Committees set up by the Labor Division of the War Production Board of the United States (Appellants' Opening Brief, pp. 13, 16), or their peacetime counterpart and successors such as the instant trust.

That employer payments to the trust in the instant case are within the realm of legitimate collective bargaining was decided administratively by the General Counsel of the National Labor Relations Board when on two occasions he sustained the dismissal of appellees' unfair labor practice charges numbered 20-CB-404 against appellants' Local Union No. 246 and Paul L. Reeves, charging amongst other things a violation of 8 (b) 3 L.M.R.A., 1947 (29 U.S.C. 158 (b) 3) i.e. that said appellant union by striking to obtain the agreement of the employer to pay into the instant Trust had refused to bargain collectively with the appellees. (R. 47, 48.)

We submit the payments here called for are not within the prohibition of the statute.

**THE TRUST PERFORMS NONE OF THE FUNCTIONS OF A LABOR ORGANIZATION.**

The vice of appellees' argument, pages 4 thru 10 of its Brief On Behalf Of Appellees is that appellees fail to distinguish between the right, power and authority of "dealing with employers," bargaining and negotiating with employers, and the right, power and authority to enforce the deal made with the employer, the bargain, the collective bargaining agreement when completed.

Subsection 5 of Section 152, Title 27 U.S.C. defines "Labor Organization" as follows:

> "The term 'labor organization' means any organization of any kind, or any agency or employee representation committee or plan in which employees participate and which exists for the purpose, in whole or in part, *of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment or conditions of work.*" (Emphasis added.)

The important phrase in the foregoing definition is "dealing with employers."

In *Borg v. International Silver Co.*, 11 Fed. (2d) 147 "dealing" is defined at page 150 as follows:

> "Dealing implies ordinarily a trade between two opposite parties."

As used in the instant statute "dealing with employers" is to bargain with employers.

The instant statute defines collective bargaining as follows in 29 U.S.C. 158 (d):

> "For the purposes of this section, to bargain collectively is the performance of the mutual obligation

> of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder.''

To ''negotiate'' is defined in *Mason v. Mazel,* 82 C.A. (2d) 769, 777, 187 Pac. (2d) 98, 100 as

> ''To . . . treat with a view to coming to terms on some matter, as a purchase or sale, a treaty, etc.; to conduct communications or conferences as a basis of agreement . . .''

We submit therefore that the phrase ''dealing with employers'' means to communicate, confer, treat, trade and bargain with employers for the purpose of coming to an agreement, a treaty between the employees and employers.

That is not a purpose of the trust here involved and the trustees have not by the terms of the trust instrument either expressly or impliedly been given any such right, power, authority or duty.

In so far as ''dealing with employers concerning . . . wages rates of pay, hours of employment or condition of work'' is involved the ''dealing'' ended and the ''deal'' was consummated when the collective bargaining agreement was executed by District Council No. 36 or its predecessor The Valley Group Negotiating Committee and the Employer associations.

In so far as ''dealing with employers concerning . . . labor disputes'' is involved we find that a ''labor dispute''

is defined in Subsection 9 of Section 152, Title 29 U.S.C. as follows:

> "The term 'labor dispute' includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, charging, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee."

Such a "labor dispute" is likewise resolved and dealt with and the "dealing with employers" ended when the collective bargaining agreement settling the "controversy concerning terms, tenure or conditions of employment" for the ensuing contract period was executed.

In addition, any "controversy concerning the association or representation of persons in negotiating, fixing, maintaining, changing or seeking to arrange terms or conditions of employment" was dealt with and settled and the "dealing with employers" ended when the employers recognized the Valley Group Negotiating Committee and its Successor District Council No. 36 as the sole and exclusive representative of their employees for the purpose of collective bargaining. (R. 50, 53; 59, 60; 62.) (R. 107, Printed Booklet.)

This brings us to "dealing with employers concerning grievances."

The Trust and the Trustees have no authority expressed or implied to "deal with employers," i.e. to bargain, treat or negotiate the settlement of any grievance.

The authority given the Trust and Trustees is "to enforce the collective bargaining agreement." (Section 17, Exhibit A attached to Complaint.) (R. 28.)

In *U.S. v. Gordin,* 287 Fed. 565, "To enforce" is defined at page 572 as follows:

> "'To enforce' means to put or keep in force, to compel obedience to; to cause to be executed or performed, as to enforce laws or rules."

Thus, the power "to enforce the collective bargaining agreement" completely negatives any idea of "dealing," treating, bargaining or negotiating with employers.

The duty "to enforce" precluded "dealing with," treating, bargaining or negotiating with employers or any one else and any attempt so to do would be a direct violation of trust by the Trust and Trustees involved.

It is the deal as made, the collective bargaining agreement the Trust and Trustees must enforce and insofar as the Trust and Trustees are concerned, the collective bargaining agreement is fixed and immutable.

The Courts enforce collective bargaining agreements and the arbitration provisions therein contained and in a very real sense, when the Trust acts to enforce the agreement, it acts in the place and stead of the Courts.

Section 185 (a) Title 29 U.S.C. provides:

> "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

On June 3, 1957 the Supreme Court of the United States, in *Textile Workers Union of America v. Lincoln Mills,* 353 U.S. ....., 77 S. Ct. ....., 1 L. Ed. (2d) 972 (advance) said:

> "Other courts—the overwhelming number of them—hold that § 301 (a) is more than jurisdictional—that it authorizes federal courts to fashion a body of federal law for the enforcement of these collective bargaining agreements and includes within that federal law specific performance of promises to arbitrate grievances under collective bargaining agreements. Perhaps the leading decision representing that point of view is the one rendered by Judge Wyzanski in Textile Workers Union v. American Thread Co., 113 F. Supp. 137. That is our construction of § 301 (a), which means that the agreement to arbitrate grievance disputes contained in this collective bargaining agreement, should be specifically enforced." (Pp. 977, 978.)
>
> * * *
>
> "Thus collective bargaining contracts were made 'equally binding and enforceable on both parties.' (Id., p. 15.) As stated in the House Report, supra, p. 6, the new provision 'makes labor organizations equally responsible with employers for contract violation and provides for suit by either against the other in the United States district courts.' To repeat, the Senate Report, supra, p. 17, summed up the philosophy of § 301 as follows: 'Statutory recognition of the collective agreement as a valid, binding, and enforceable contract is a logical and necessary step. It will promote a higher degree of responsibility upon the parties to such agreements, and will thereby promote industrial peace.' "
>
> "Plainly the agreement to arbitrate grievance disputes is the quid pro quo for an agreement not to

> strike. Viewed in this light, the legislation does more than confer jurisdiction in the federal courts over labor organizations. It expresses a federal policy that federal courts should enforce these agreements on behalf of or against labor organizations and that industrial peace can be best obtained only in that way." (P. 979.)
>
> * * *
>
> "The question then is, what is the substantive law to be applied in suits under § 301 (a). We conclude that the substantive law to apply in suits under § 301 (a) is federal law which the courts must fashion from the policy of our national labor laws." (P. 980.)

Appellees' misconception and that of the Court below arises from the fact that they both fail to distinguish between the right, power and authority of "dealing with," bargaining and negotiating and the right, power and authority to enforce the deal, bargain and collective bargaining agreement when negotiated.

They further fail to distinguish between the authority to invoke the power to enforce, i.e., make a claim, file a grievance, file an action in a Court and the authority to enforce.

The authority to enforce lies in the Court, not the litigant who invokes the power by filing the lawsuit.

Thus, both the collective bargaining representative of the employees, an employee, the representative of the employers and an employer have the right and, in some instances, the duty to invoke the power of the Trust and Trustees to enforce the agreement as they may invoke the power of a Court, but they do not have the power or

authority "to enforce" the collective bargaining agreement.

We submit that on reason and authority the Trust and Trustees are not, and each of them, is not a "representative" within the meaning of Section 186 of Title 29 U.S.C.

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**LOCAL 246 IS NOT A REPRESENTATIVE WITHIN THE MEANING OF 29 U.S.C. 186 (a) AND (b).**

The appellees and the Court below misconceive the meaning of Section 8(a)(3) (29 U.S.C. 158(a)(3)) of the Labor Management Relations Act.

District Council No. 36, as was its predecessor Valley Group Negotiating Committee, is an association of local unions, labor organizations. Acquisition of membership is through such local unions.

Since the Valley Group Negotiating Committee and its Successor, District Council No. 36, was the representative of the employees within the meaning of Section 158 (a) 3, it could and did provide for membership therein in keeping with its own laws. Section 158 (a) 3 does not, in any way, interfere with the internal operation of a labor organization other than to require that membership be available to all employees on its same terms and conditions (Sec. 158 (a)(3)(A)) and Section 158 (b)(1)(A) specifically provides:

> "That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein."

Thus, the so-called Union Shop Clause does not because it cannot in the instant case make Local 246 a "Representative" within the meaning of 29 U.S.C. 186 (a) and (b).

The test of a "Representative" within the meaning of 29 U.S.C. 186 (a) and (b) is set out in *U.S. v. Ryan,* 100 L. Ed. (advance p. 272).

The answer turns on the extent to which the person or organization participates in the collective bargaining process.

It is clear on this record that Local 246 does not, as a local union, participate at all in the collective bargaining process and hence cannot be a representative within the meaning of 29 U.S.C. 186.

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**PAYMENTS TO THE TRUST ARE NOT PAYMENTS OF MONEY OR OTHER THINGS OF VALUE TO LOCAL 246.**

We are not here dealing with suppositions. We have in the instant case a definite Record and a specific Trust Agreement.

Appellees' hypothetical cases fail, as they must, because they ignore the Record and the Trust Agreement and, in fact, assume the existence of facts and a Trust Agreement materially different from the facts and Trust Instrument before the Court.

The test is not found in the decisions of the Courts dealing with Massachusetts Trusts. The test is found in those decisions dealing with Trusts.

In *Betker v. Nalley,* 140 F. (2d) 171, at page 173, the Court adopts the test laid down in *Warsco v. Oshkosh Savings and Trust,* 183 Wis. 156, 160, 161; 196 N. W. 829, 830 in which the Court says:

> "If the donor has full control and dominion over the Trust property, *so that according to the terms of the Trust* he can use it as and when he pleases, the trustee becomes his agent to hold title to property, invest, sell and collect income for him and pay as he directs. The donor has parted with no dominion over his property nor any part thereof *by the terms of the trust* and such agreement is no valid trust agreement." (Emphasis added.)

Applying this test what are the *terms* of the trust agreement?

The Trust agreement provides:

> "All questions pertaining to this agreement, the trust, and their validity, administration and construction shall be determined in accordance with *the laws of the State of California,* and with any pertinent laws of the United States." (R. 36.) (Emphasis added.)

Under the laws of the State of California the trust here involved is a charitable trust and meets the tests laid down by the Supreme Court of the State of California.

See:

*People v. Cogswell,* 113 Cal. 129;
*Collier v. Lindley,* 203 Cal. 641;
*Estate of Murphy,* 7 C. (2d) 721;
*Estate of Tarrant,* 38 C. (2d) 42.

The trust agreement further provides:

> "The duties, responsibilities, liabilities and disabilities of the Board of Trustees or any Trustee shall be determined solely by the express provisions of this agreement and no further duties, responsibilities, liabilities or disabilities shall be implied." (R. 34.)

The trust contains no provisions requiring the trustees or any of them to obey or even consider instruction given them by those who appointed them.

Absent such specific provisions in the trust agreement the trustees are required to and must exercise their independent personal judgment. To submit their individual judgment to the collective judgment of those who appointed them would be in direct violation of the provisions of the trust since Article IV section 1 of the Trust Agreement provides:

> "Subject only to the limitation hereinafter set out the Board of Trustees are authorized to and shall have the power to pay out the assets of the trust to any person, firm, corporation, association whether incorporated or unincorporated or trust—*at their sole and exclusive discretion* for the general welfare of the Plumbing and Pipe Fitting Industry. . . ." (R. 28.)

The error in appellees' position arises from the fact that it assumes that all representatives of organized labor and organized employers are essentially dishonest and that they will necessarily violate the trust agreement, violate the law and in general be false to their trust.

This assumption of course aside from being contrary to the Record is false in fact and law.

The Court must assume that the trustees will act in all respects in a lawful and proper manner and will exercise their "sole and exclusive discretion" and will not be subservient to any group of persons in breach of their trust and their obligation as trustees.

Aside from the fact that the law applicable to Massachusetts Trusts, a business device peculiar to the State of Massachusetts, can have no application here the fact is that the trust instrument in the instant case by resting "sole and exclusive discretion" in the trustees specifically negates the proposition that the trustors' or beneficiaries' instructions are to be obeyed.

One cannot have "sole and exclusive discretion" if one is required to obey the instructions of a third party. The two propositions are mutually exclusive.

Payments to the trust are not we submit payments of money or other thing of value to Local 246 or any other entity except the trust.

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**CASES RELIED UPON BY APPELLANTS.**

Appellees and the Court below err when they say:

> "In the Essex case, payments by the employer were to be made to six trustees of a welfare fund. From aught that appears in the opinion of the Court the Trust providing for the welfare fund was in strict compliance with the requirement of Section 302 (c) (5)."
>
> Appellees' Brief, p. 20. (R. 92.)

The proviso of Section 302 (c) 5 (B) (29 U.S.C. 186 (c) 5 (B)) states that:

> "(B) the detailed basis on which payments are to be made is specified in a *written agreement with the employer.* . . ."

In the *Essex* case (*United Marine Division v. Essex Transportation Company,* 216 Fed. (2d) 410) there was no written agreement with the employer, i.e. Essex Transportation Company.

The Court in its opinion states:

> "The plaintiff alleges that the defendant company *orally agreed to make payment to six trustees* of a welfare fund." (P. 411.)

Thus the Court in the *Essex* case properly considered the effect not of the proviso of 302 (c) 5 (B) (29 U.S.C. 186 (c) 5 (B), but the provisions of 302 (a) and (b) (29 U.S.C. 186 (a) and (b)) which are the portions of the statute under which this action is proceeding.

While not binding in this Court we suggest and submit that the *Essex* case, absent anything to the contrary, is persuasive.

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**CONCLUSION.**

In the language of the Court in the *Essex* case:

> " 'We think that the promise in this case is outside the evil which the Congress was endeavoring to erase in the sections of the statute which we have quoted. Since the fact situation is outside that evil, we do

not think we should enlarge an application of the statute to void the type of arrangement which has met with legislative sanction, judicial approval and is a growing trend in employer-employee relations.' '' (P. 413.)

Appellants respectfully submit that the decision of the Court below should, as it was in the *Essex* case (supra), be reversed.

Dated, San Francisco, California,
August 12, 1957.

Respectfully submitted,
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